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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

CASE NO. 07-CV-60399
ALTONAGA/TURNOFF

SPIRIT AIRLINES, INC.,

Plaintiff,

vs.

24/7 REAL MEDIA, INC., ADVERTISING.COM, INC., AMERICA ONLINE, INC. DBA AOL, BURST MEDIA CORPORATION, CARROLLTON BANK, CHEAPFLIGHTS (USA), INC., ECHO TARGET, INC., HOTWIRE, INC., INTERCEPT INTERACTIVE, INC., PRICELINE.COM, LLC, RACKSPACE, LTD., SHERMANS TRAVEL, INC., SIDESTEP, INC., SMARTER LIVING, INC., SPECIFICMEDIA, INC., TRAVEL MARKETING GROUP, INC., TRAVELZOO, INC., TRIBAL FUSION, INC., TRIPADVISOR LLC, VALUECLICK, INC., AND THE WEATHER CHANNEL INTERACTIVE, INC.,

Defendants.
_______________________________________/

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION TO TRANSER OF VENUE

Pursuant to 28 U.S.C §§ 1404(a) and 1406(a), Plaintiff Spirit Airlines, Inc. ("Spirit") moves this Court for an order transferring this action to the United States District Court, District of Delaware based upon the interests of justice, the convenience of the parties, and based upon the order of the court dated May 3, 2007.

Dockets.Justia.com

INTRODUCTION

Spirit finds itself in an unfortunate situation due to no fault of its own. Spirit entered into a contract with Eisner Communications, Inc. ("Eisner"). Subsequently, Eisner went out of business and failed to pay its creditors (the defendants) amounts owed to them by Eisner. Because Spirit owes Eisner a significant amount of money, the defendants are now looking to Spirit for payment. Spirit admits it owes Eisner money and is merely seeking to deposit these funds with the court to allow Eisner's creditors to resolve their disputes over the funds. As Spirit has nothing to gain out of this litigation and is incurring substantial costs, Spirit would like nothing more than to deposit the funds with the court and remove itself from this case. However, Spirit seeks to have this case transferred to the United States District Court, District of Delaware because this situation satisfies the two-part test used when determining whether transfer is appropriate: the case could have originally been brought in Delaware, and it is in the interests of justice to transfer the case.

PARTIES AND PROCEDURAL BACKGROUND

The facts of this case are set forth in detail in Spirit's Complaint filed with this Court. Accordingly, Spirit will only briefly summarize the case. On September 15, 2005, Spirit entered into an advertising agreement ("Agreement") with Eisner. The Agreement called for Eisner to provide online advertising for Spirit. Under this Agreement, Eisner's services to Spirit included ordering and contracting for interactive space, talent, and materials from third-party vendors. Eisner purchased space, time, materials, and services from third-party vendors. Spirit was never required to pay any third-party vendor; Spirit never had any contract with any third-party vendor; and Spirit never received an invoice from any third-party vendor. Spirit only received invoices

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from Eisner. Pursuant to the Agreement, Eisner was solely responsible to pay the third-party vendors.

On November 12, 2006, Eisner informed Spirit that it was closing its business operations. On November 14, 2006, Spirit received a demand letter from Carrollton Bank, Eisner's secured creditor, demanding that any and all unpaid invoices for work performed by Eisner must be made to Carrollton Bank. Shortly after this demand, Spirit began receiving communications from creditors of Eisner demanding payment of outstanding Eisner invoices.

Spirit owes Eisner $458,186.26 ("Eisner Funds") for services provided to Spirit. Spirit admits that the Eisner funds are due and owing to someone. Because Spirit has received conflicting demands for the Eisner Funds from Carrollton Bank and third-party advertising vendors, Spirit brought this interpleader action in order to deposit the Eisner Funds with the Court and allow the defendants to determine who is entitled to the Eisner Funds. As described in more detail in the Complaint, Spirit is merely a disinterested stakeholder and claims no interest in the Eisner Funds.

On March 22, 2007, Spirit filed its Complaint. On May 3, 2007, the Court issued an order ("Order") requesting that Spirit respond to certain deposit and venue questions.[1] In response to the Court's questions regarding whether venue is appropriate in this Court, Spirit respectfully requests that the Court grant this Motion to Transfer Venue.

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1 Spirit has filed a response in conjunction with this motion in response to the Court's Order.

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ARGUMENT

A. Motions to Transfer Venue under Sections 1404(A) and 1406(A)

When deciding whether to grant a motion to transfer venue under 28 U.S.C §§ 1404(a)[2] or 1406(a),[3] courts apply a two-part test. First, the court must determine whether the action "could have been brought" in the transferee district. Second, the court, in its discretion, must determine whether the action should be transferred "in the interest of justice."[4] This case satisfies both of these criteria.[5]

B. Because Jurisdiction and Venue are Proper in the United States District Court, District of Delaware, this Action "Could Have Been Brought" in the Transferee District

In this case, jurisdiction under the federal interpleader statue is proper in Delaware. Under 28 U.S.C. § 1335, a district court has jurisdiction over or any civil action of interpleader if: (1) the amount in controversy exceeds $500.00; and (2) two or more adverse claimants of

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2 Section 1404(a) states:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to another district of division where it may have been brought.

3 Section 1406(a) states:

> The district court of a district court in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

4 28 U.S.C § 1404(a); 28 U.S.C § 1406(a); *Gill v. Three Dimension Systems, Inc.*, 87 F. Supp.2d 1278 (M.D. Fla. 2000)(applying 28 U.S.C § 1404(a)); *Biometics, LLC v. New Womyn, Inc.*, 112 F. Supp. 2d 869, 875 (E.D. Mo. 2000) (applying 28 U.S.C § 1404(a)); *Thorton v. Toyota Motor Sales U.S.A. Inc.*, 397 F.Supp. 476 (D.C. Ga.1975) (applying 28 U.S.C § 1406(a)).

5 Although proper venue in the transferor court is required to transfer venue under Section 1404(a); proper venue in the transferor court is not required under Section 1406(a). Courts use a similar analysis under both statutes when determining whether a transfer is in the interests of justice.

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diverse citizenship claim or may claim to be entitled to the disputed property.[6] In addition, Plaintiff must deposit the disputed property with the court.[7] As stated earlier, the Eisner Funds total $458,186.26, which is over $500.00. Accordingly, the first part of the jurisdictional test is met. Spirit named twenty-one defendants in its interpleader complaint. Eight defendants have answered the complaint. Four of the answering defendants reside in Delaware.[8] In addition, four of the answering defendants reside outside of Delaware.[9] Accordingly, two or more adverse claimants of diverse citizenship have or may claim entitlement to the Eisner Funds; and therefore, the second part of the jurisdictional test is met.

Finally, as stated earlier, Spirit is ready and willing to deposit the Eisner Funds with this Court, or the transferee court if this motion is granted.[10] Because Spirit could have deposited the Eisner Funds with the transferee court if this action was brought in Delaware, and because Spirit is ready to do so immediately if this Court grants this motion, the requirement that Spirit deposit the Eisner Funds with the court is also met. Accordingly, jurisdiction in Delaware would have been proper if this case was originally brought in Delaware.

In addition, venue is proper in Delaware. Proper venue for an interpleader action under 28 U.S.C. § 1335 is where at least one of the claimants resides.[11] Because four of the eight

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6 28 U.S.C. § 1335(a)(1).

7 28 U.S.C. § 1335(a)(1).

8 The following answering defendants reside in Delaware: Hotwire, Inc., SideStep, Inc., TripAdvisor, LLC, and Value Click Inc.

9 The following answering defendants reside outside of Delaware: Carrollton Bank (Maryland), Burst Media Corporation (Massachusetts), Smarter Living, Inc. (Massachusetts), and Echo Target, Inc. (New York).

10 Although not required, if the Court determines a deposit of the stake is required for this Court to rule on this Motion, Spirit will do so immediately. If not, Spirit will deposit the stake with the transferee court.

11 28 U.S.C. § 1397.

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answering defendants reside in Delaware, venue is proper in Delaware. As a result, this case could have originally been brought in Delaware, and the first part of the two-part transfer of venue test is met.

C. The Interests of Justice and Convenience Would be Served by Transferring this Action to the United States District Court, District of Delaware

Because this action could have been brought in Delaware, this Court can exercise its jurisdiction to transfer the case "in the interest of justice."[12] On a motion to transfer a case for improper venue, a district court is vested with broad discretion in determining whether, in the interests of justice and the convenience of the parties, the motion should be granted.[13] Section 1406(a) permits transfer of an action even if the court in which it was filed has no jurisdiction over the defendants.[14]

Transfer is generally more in the interest of justice than dismissal.[15] Dismissal is a harsh remedy, and in the interests of justice, a court should transfer the case to a venue where the case may be properly asserted.[16] Doubts regarding transfer should be resolved in favor of preserving the action, particularly where it appears venue may be properly laid in the proposed transferee district.[17] Because the federal interpleader statute and the federal statute governing change of venue were adopted to provide a broad remedy for the formerly inadequate method of relief

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12 28 U.S.C. § 1406(a).

13 *Cote v. Wadel*, 796 F.2d 981 (7th Cir. 1986).

14 *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 82 S. Ct. 913, 8 L.ED. 2d 39 (1962); *Roxco, Ltd. v. Harris Specialty Chemicals, Inc.*, 133 F.Supp. 2d. 911 (S.D. Miss. 2000).

15 *Nation v. United States Government*, 512 F. Supp. 121, 126 (S.D. Ohio. 1981).

16 *British-American Ins. Co. v. Lee*, 403 F.Supp. 31 (D. Del. 1975); *Scott Paper Co. v. Nice-Pak Products*, 678 F.Supp. 1086 (D. Del. 1988).

17 *Nation*, 512 F.Supp. at 126-127.

17 *Wilmington Trust Co. v. Gillespie*, 397 F. Supp. 1337 (D. Del. 1975).

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available to all litigations, all are to be construed and applied liberally so as to best effect their intended purpose.[18]

In *Big Island Yacht Sales, Inc. v. Dowty*, the United States District Court, District of Hawaii, concluded that the stakeholder had brought its statutory interpleader action in the wrong district because none of the claimants resided in the district where the action was brought.[19] Despite the fact that the stakeholder's action would not be time barred if the case was dismissed, the court concluded that, in the interests of justice, the case should be transferred because the purpose of an interpleader action is to prevent multiple actions concerning the same property, because a transfer would expedite a decision on the merits of the interpleader action, and because the stakeholder did not purposefully select the inappropriate venue to harass the defendants.[20]

In this case, a transfer would prevent multiple actions concerning the same property and expedite a decision on the merits. If the case is transferred, the action is preserved and is allowed to continue in its current state. All twenty-one defendants will remain served, all defendants that have chosen to answer remain in the same position, and a resolution of the case is expedited. Finally, Spirit did not file this action in Florida to harass any defendant. Spirit is in the unfortunate position of being in the middle of a dispute in which it has no interest in the outcome. When there is no indication the suit was commenced in an improper venue for the purposes of harassment, transfer is preferable.[21]

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19 *Big Island Yacht Sales, Inc. v. Dowty*, 848 F.Supp. 131, 134 (D. Hawaii 1993).

20 *Id.* (the court in *Big Island Yacht Sales, Inc.*, also included the existence of another lawsuit as an interest of justice factor).

21 *De La Fuente v. Interstate Commerce Commission*, 451 F.Supp. 867, 872 (D.C. Ill. 1978).

Courts have identified a list of non-exclusive factors which provide guidance in determining whether, in the interests of justice and convenience, a motion to transfer under Section 1406(a) should be granted. Among these non-exclusive considerations are:

(1) to avoid injustice which may result from dismissing actions for improper venue;[22]

(2) to avoid time consuming and justice defeating technicalities;[23]

(3) to permit change of venue where there are obstacles to an expeditious adjudication on the merits, including the inability to perfect service on the merits;[24]

(4) to encourage resolution of controversies upon their merits;[25] or

(5) for the convenience of the parties.[26]

Given the flexible and remedial nature of interpleader actions, it would be an injustice to dismiss this action as the stated purpose of the interpleader statute and the transfer statutes is to provide an equitable remedy for the parties. Spirit has no interest in the Eisner Funds and is receiving no benefit as a result of this case. Spirit was forced to file this interpleader action as a result of the multiple demands it received for the same funds. Spirit has incurred substantial costs to ensure a fair and just outcome for the interested parties, the defendants. It would be unjust to force Spirit to again undertake the substantial effort and cost it took to serve the numerous defendants, located nationwide, when Spirit is merely a disinterested party forced into this situation. This is especially true considering most of these defendants have decided not to

22 *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 82 S. Ct. 913, 8 L.ED. 2d 39 (1962).

23 *Spherion Corp. v. Cincinnati Financial Corp.*, 183 F. Supp. 2d 1052 (N.D. Ill. 2002).

24 *Carteret Sav. Bank, F.A. v. Shushan*, 919 F.2d 225, 18 Fed. R. Serv. 3d 841 (3rd Cir. 1990).

25 *Cinalli v. Kane*, 191 F.Supp. 2d 601 (E.D. Pa. 2002).

26 *French Transit, Ltd. v. Modern Coupon Systems, Inc.*, 585 F.Supp. 22 (S.D.N.Y. 1994).

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answer the Complaint. A transfer permits the transaction of judicial business more conveniently and expeditiously.[27]

Second, dismissing this action would result, in the best case scenario, in a duplicative and wasteful exercise of valuable time and resources. In addition, because the purpose of the interpleader statute, as well as the venue transfer statutes, is to provide a flexible and equitable remedy in order to reach a just result, dismissing this case on a technicality that can be easily cured by transferring this case would not be in the best interests of justice and would be contrary to the purpose of the interpleader and transfer of venue statutes.

Third, a transfer would provide the most expeditious adjudication of this case. Nationwide service has already been commenced and answers have been filed. A transfer will preserve this case in its current state, the status of the parties that have chosen to participate in this action will be preserved, and the transferee court and the parties will be able to seamlessly proceed to a resolution in this case. There are twenty-one named defendants in this case. The most expeditious way to proceed in a case with such a large number of parties is to permit a transfer, and allow the case to proceed in one, already-filed case.

A transfer will encourage a resolution on the merits. All parties that have joined this action are ready for a resolution of this matter. A transfer of this case is the best way to further both the intent of the interpleader statute, the transfer of venue statutes, and the parties' goal of resolution.

It is in the convenience of all parties to transfer this action to Delaware. Out of the eight answering defendants, four reside in Delaware.[28] In addition, Spirit is incorporated in Delaware.

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[27] *De La Fuente,* 451 F.Supp. at 872 (D.C. Ill. 1978).

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Finally, Eisner's secured creditor, Carrollton Bank, as well as Burst Media Corporation, SideStep, Inc., and ValueClick, Inc. have all stated to Spirit they have no objection to this transfer.[29]

An interpleader action is one in equity and is governed by equitable principles.[30] The federal interpleader statutes were enacted to provide a liberal remedy for the adjudication of claims to property or money.[31] Genesis of interpleader is equity and it is entitled to remedial flexibility.[32] Statutory interpleader is remedial in nature; and, therefore, must be construed so that injustice will not result.[33] The provisions of the Interpleader Act are intended as remedial legislation to meet a situation where equitable relief is necessary, and hence should be liberally construed.[34] It would be unjust and contrary to the purpose of the interpleader and change of venue statutes to not permit a transfer of venue. The statutory interpleader is designed not only to protect stakeholders from double or multiple liability but also to protect them from the trouble and expense of double or multiple litigation.[35] If this case does not move forward, all parties are once again subject to multiple pieces of litigation, Spirit is, once again, subject to multiple liability, and all parties will incur significant time and expense only to reach the same destination the parties are currently at in this case.

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28 In addition, America Online, Inc. (Delaware) and Advertising.Com, Inc. (Maryland) have appeared by filing a motion for an indefinite enlargement of time to response to the Complaint.

30 *Champlin Petroleum Co. v. Ingram*, 560 F.2d 994 (10th Cir. 1977).

31 *Marine Bank & Trust Co. v. Hamilton Bros., Inc.*, 55 F.R.D. 505, 506 (M.D.Fla., 1972).

32 *Humble Oil & Ref. Co. v. Copeland*, 398 F.2d 364, 368 (4th Cir. 1998).

33 *Austin v. Texas-Ohio Gas Co.*, 218 F.2d 739 (5th Cir. 1955) See also, *Koehring Co. v. Hyde Const. Co.*, 297 F.Supp. 731 (D.C. Wis. 1969).

34 *Fidelity & Gas Co. of New York v. Wilson*, 105 F.Supp. 454, 455-456 (E.D.S.C. 1952).

35 *Tollett v. Phoenix Assur. Co. of New York*, 147 F.Supp. 597, 605 (D.C. Ark. 1956).

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Finally, it should be emphasized that this is not a venue transfer dispute where adverse parties are disputing the weight given to a contractual choice of venue provision, or where adverse parties are disputing the availability and convenience of witnesses. Rather, Spirit seeks this transfer for the benefit of all the parties.

CONCLUSION

Spirit is a disinterested party who simply wants to deposit the Eisner Funds with the proper Court in order for the claimants to adjudicate their claims. Justice and convenience requires that this case be transferred to the United States District Court, District of Delaware. Spirit is not attempting to transfer this case for its own convenience or to gain an advantage in this case. Spirit only wants to preserve and transfer this case in order to prevent multiple lawsuits, unnecessary time and expenses, and allow for an expedited adjudication of this matter. Transferring this case to Delaware will result in greater convenience for the parties as half of the answering defendants are located in Delaware.

For these reasons, the Court should exercise its discretion and, in the interests of justice, transfer this case to the United States District Court, District of Delaware.

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Dated: May 17, 2007

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Defendants.
______________________________/

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON May 17, 2007, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served on this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronic Notices of Electronic filing.

s/Anthony J. Carriuolo
Anthony J. Carriuolo

SERVICE LIST
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Case No. 07-cv-60399-CMA (Altonaga/Turnoff)
United States District Court, Southern District of Florida

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